

Dissenting Views to Accompany H.R. 6054, "Military Commissions Act of 2006"

We dissent from the passage of H.R. 6054, the "Military Commissions Act of 2006." While we believe it is necessary that Congress pass legislation to provide the President with a tough and fair system of military commissions that will ensure swift convictions for terrorists, we have serious concerns about the manner in which this legislation achieves that vital objective.

We dissent for several reasons. First, the legislation endangers our service members by rewriting and limiting compliance with the Geneva Conventions and with U.S. legal norms. Second, the legislation violates separation of powers by stripping federal courts of habeas jurisdiction. Finally, the legislation was considered under a flawed and unnecessarily truncated process. The legislation is strongly opposed by the following wide array of individuals, organizations, and highly respected members of the U.S. military: retired General and former Chairman of the Joint Chiefs of Staff Colin Powell;¹ retired General and former Chairman of the Joint Chiefs of Staff John Vessey;² retired Rear Admirals John Hutson and Donald Guter, and retired Brigadier General David Brahms;³ forty-five retired military leaders;⁴ and numerous families who lost loved ones in the 9/11 attacks.⁵

Description of Legislation

H.R. 6054 has, as its stated purpose, "to authorize trial by military commission for violations of the law of war..." First, the legislation would authorize standards and

¹Letter from General Colin Powell to the Hon. John McCain (September 13, 2006), available at <http://www.washingtonpost.com/wp-dyn/content/graphic/2006/09/14/GR2006091400728.html>.

²Letter from General John Vessey to the Hon. John McCain (September 12, 2006) (on file with the House of Representatives Committee on the Judiciary, Democratic Staff).

³Letter from retired Rear Admirals John Hutson and Donald Guter, and retired Brigadier General David Brahms to the Hon. John Warner, Chairman of the Senate Committee on Armed Services and the Hon. Carl Levin, Ranking Member of the Senate Committee on Armed Services (September 12, 2006) (on file with the House of Representatives Committee on the Judiciary, Democratic Staff).

⁴Letter to the Hon. John Warner, Chairman of the Senate Committee on Armed Services and the Hon. Carl Levin, Ranking Member of the Senate Committee on Armed Services (September 12, 2006) (on file with the House of Representatives Committee on the Judiciary, Democratic Staff).

⁵Letter from over 35 family members to the Hon. John Warner, Chairman of the Senate Committee on Armed Services and the Hon. Carl Levin, Ranking Member of the Senate Committee on Armed Services (September 14, 2006) (on file with the House of Representatives Committee on the Judiciary, Democratic Staff).

procedures for the military commissions within the Uniform Code of Military Justice.⁶ Among other things, the bill provides standards for the admission of evidence, including hearsay evidence, and in certain circumstances, allows for the introduction of sensitive classified information into evidence outside the presence of the accused.⁷

Second, in Section 4, H.R. 6054 would amend title 18, United States Code, to redefine a war crime under United States law as any "serious" violation of Common Article 3 of the Geneva Conventions ("Common Article 3").⁸ Conduct, which would constitute a serious violation of Common Article 3, would include torture, cruel or inhuman treatment, murder, mutilation or maiming, intentionally causing great suffering or serious injury, and taking hostages. The section narrowly defines cruel or inhuman treatment, in contrast to the Common Article 3 standard, making the definition similar to the definition of torture.⁹

Third, in Section 5, the legislation would amend title 28, United States Code, to allow for limited appeals of commission and Combatant Status Review Tribunal decisions to the United States Court of Appeals for the District of Columbia Circuit. In addition, the section strips federal courts of pending or future habeas jurisdiction "relating to any aspect of the alien's detention, transfer, treatment, or conditions of confinement."

Fourth, the legislation, in Section 6, would lower the standards of the Geneva Conventions by establishing that compliance with section 1003 of the Detainee Treatment Act ("DTA") of 2005¹⁰ fully satisfies the obligations of the United States with regard to Common Article 3. In addition, the section prohibits individuals from invoking the Conventions "as a source of rights" in U.S. courts.

Concerns with Legislation

A. H.R. 6054 Endangers our Troops By Lowering U.S. and International Standards

The legislation endangers our troops because it lowers the standards set forth in the

⁶ Section 3, H.R. 6054, creating new chapter 47A of Title 10, United States Code.

⁷ *Id.*

⁸ Common Article 3 of the 1949 Geneva Conventions sets out minimum standards for the treatment of detainees in armed conflicts of a non-international character. Such persons are to be treated humanely and protected from certain treatment, including "violence to life and person," "cruel treatment and torture," and "outrages upon personal dignity, in particular, humiliating and degrading treatment."

⁹ The bill defines cruel and inhuman treatment almost identically with torture, linking it to "severe physical pain or suffering or severe mental pain or suffering . . . including severe physical abuse..." It does not further define "severe physical abuse" which distinguishes the offense from torture.

¹⁰ Public Law 109-148

Geneva Conventions, treaties this nation led the way in establishing and has maintained for over 50 years. In fact, the Geneva Conventions have been ratified by 194 countries and our own JAGs have testified that the United States military has been trained to comply with them for decades.

Redefining the Geneva Conventions poses a grave threat to our troops. Our uniformed military has been among the most vocal in their concerns about diluting this standard because they want to do everything possible to ensure that American forces would be treated with a similarly high standard if captured. Former Secretary of State, retired Gen. Colin Powell has stated that the Administration's proposal "would put our own troops at risk."¹¹ The highly respected former Chairman of the Joint Chiefs of Staff, General John Vessey, has said that the change, "could give opponents a legal argument for the mistreatment of Americans being held prisoner in time of war" and would "undermine the moral basis which has ... guided our conduct in war throughout our history."¹²

B. The Bill Broadly Strips Courts of Habeas Jurisdiction

In a sweeping measure, Section 5 of H.R. 6054 contravenes separation of powers and constitutional guarantees by stripping federal courts of habeas review.¹³ If there is any one principle that has defined our nation, it is the respect for the rule of law and the independence of the courts. As numerous former federal judges, including Reagan FBI Director Sessions wrote, "[f]or two hundred years, the federal judiciary has maintained Chief Justice Marshall's solemn admonition that ours is a government of laws, and not men. The proposed legislation imperils this proud history..."¹⁴

Moreover, by legislating that all pending and future habeas petitions are not subject to judicial review, the legislation leaves itself open to an adverse court ruling that will strike this bill similar to how the Supreme Court struck down the President's use of military commissions in *Hamdan v. Rumsfeld*.¹⁵ This would lengthen the current delay in the prosecution of terrorists. Not a single trial has taken place, or a single criminal convicted, in military commissions in the

¹¹ Letter from General Colin Powell to the Hon. John McCain (September 13, 2006), available at <http://www.washingtonpost.com/wp-dyn/content/graphic/2006/09/14/GR2006091400728.html>.

¹² Letter from General John Vessey to the Hon. John McCain (September 12, 2006) (on file with the House of Representatives Committee on the Judiciary, Democratic Staff).

¹³ Habeas petitions "ask whether there is a sufficient factual and legal basis for a prisoner's detention . . . [habeas] safeguards the most hallowed judicial role in our constitutional democracy—ensuring that no man is imprisoned unlawfully...[w]ithout habeas, federal courts will lose the power to conduct this inquiry." Letter from nine retired federal judges to Members of Congress regarding H.R. 6054 (September 14, 2006) (on file with the House of Representatives Committee on the Judiciary, Democratic Staff).

¹⁴ *Id.*

¹⁵ 126 S. Ct. 2749 (2006).

more than five years since September 11, 2001.¹⁶

C. Flawed Process for Committee Consideration

We also express our concerns regarding the Committee process. While we support the Committee obtaining jurisdiction to consider this important measure, it was also incumbent on the Committee to conduct hearings on this critical issue to inform the judgment of the Members. Unfortunately, no such hearings were held.

In addition, we would also note that during the markup, the Committee initially voted to defeat reporting the measure. Unfortunately, the Committee then went through a number of tortured exercises to reconsider and ultimately approve the measure, after the Majority was able to convince more of its members to attend the markup.¹⁷ We would note that when the Majority assumed power in 1995, one of their first measures was to eliminate proxy voting so that only those Members who attended the markups would affect the outcome of bills. By now developing a policy that in essence states that if the Majority loses a vote because its Members did not bother to show up, they will simply revote when their Members are available or it is convenient for them, they have essentially returned to the functional equivalent of proxy voting. This is unfair to the Members who take time out of their day to participate in the markup.

Conclusion

We need to come together to develop a fair system of military commissions that will swiftly convict terrorists. However, we cannot support legislation that in the name of fighting terrorism endangers our brave troops, undermines our nation's moral authority, and contravenes the principle of separation of powers and rule of law that our nation was founded on. The Committee should have passed a stronger more intelligent bill, that finally holds terrorists accountable but at the same time can withstand judicial scrutiny, protect American troops under the Geneva Conventions, and remains true to American values.

Description of Amendments Offered by Democratic Members

During the markup, there were three amendments offered by Democratic members. One amendment by Mr. Schiff and Mr. Flake, one amendment by Mr. Meehan and one by Ms. Jackson-Lee and Mr. Nadler.

1. Amendment offered by Rep. Schiff and Rep. Flake (#1)

¹⁶The importance of habeas is not a hypothetical concern. This Administration has been flatly wrong in its assessments as shown by the example of Maher Arar, who was falsely branded a terrorist and rendered to Syria where he tortured for 10 months. See Doug Struck, "Canadian Was Falsely Accused, Panel Says," *Washington Post*, September 19, 2006, at A01. In fact, if the provisions of this bill had been in force, the *Hamdan* ruling itself would not have been possible. Hamdan brought his challenge via a habeas petition.

¹⁷Dana Milbank, "Bush's Bill Suffers a Torturous Day in Committee," *Washington Post*, September 21, 2006, at A02.

Description of amendment: The Schiff-Flake amendment sought to define the domestic war crime of "cruel or inhuman treatment" by using the standards set out in the 5th, 8th, and 14th Amendments of the U.S. Constitution, similar to the definition in the Warner Bill (S. 3901) and the Detainee Treatment Act.

The amendment was defeated by a vote of 17 to 18. Ayes: Representatives Conyers, Berman, Boucher, Nadler, Scott, Watt, Lofgren, Jackson Lee, Waters, Meehan, Delahunt, Weiner, Schiff, Sanchez, Van Hollen, Inglis, and Flake. Nays: Representatives Coble, Smith, Gallegly, Goodlatte, Chabot, Lungren, Jenkins, Cannon, Hostettler, Green, Issa, Pence, Forbes, King, Feeney, Franks, Gohmert, and Sensenbrenner.

2. Amendment offered by Rep. Martin Meehan (#2)

Description of amendment: The Meehan amendment sought to strike Section 5, thereby exempting the bill's restrictions on judicial review.

The amendment was defeated by a vote of 12 to 15. Ayes: Representatives Conyers, Berman, Boucher, Nadler, Scott, Jackson Lee, Meehan, Delahunt, Weiner, Schiff, Van Hollen, and Wasserman Shultz. Nays: Representatives Coble, Smith, Goodlatte, Chabot, Lungren, Jenkins, Cannon, Inglis, Green, Flake, Forbes, Feeney, Franks, Gohmert, and Sensenbrenner.

3. Amendment offered by Rep. Jackson Lee and Rep. Nadler (#3)

Description of amendment: The Jackson Lee-Nadler Amendment sought to strike Section 6(b), which reads, "No person in any habeas action or any other action may invoke the Geneva Conventions or any protocols thereto as a source of rights, whether directly or indirectly, for any purpose in any court of the United States or its States or territories."

The amendment was defeated by a vote of 17 to 18. Ayes: Representatives Conyers, Berman, Boucher, Nadler, Scott, Watt, Lofgren, Jackson Lee, Waters, Meehan, Delahunt, Wexler, Weiner, Schiff, Sanchez, Van Hollen, and Wasserman Shultz. Nays: Representatives Coble, Smith, Goodlatte, Chabot, Lungren, Jenkins, Cannon, Bachus, Inglis, Hostettler, Issa, Flake, Forbes, King, Feeney, Franks, Gohmert, and Sensenbrenner.

John Conyers, Jr.
Howard L. Berman
Rick Boucher
Jerrold Nadler
Robert C. Scott
Melvin L. Watt
Zoe Lofgren
Sheila Jackson Lee
Maxine Waters
Martin T. Meehan

William D. Delahunt
Robert Wexler
Anthony D. Weiner
Adam B. Schiff
Linda T. Sanchez
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